Supreme Court, U.S.
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No. 00-1484

In The

Supreme Court of the United States

NISSAN MOTOR ACCEPTANCE CORPORATION,

Petitioner,

v.

LEONARD APPLEBAUM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

This case was borne out of the frustration of an individual consumer, Applebaum, in trying to get someone, anyone, to tell him how it was that NMAC claimed he owed $5611 in early termination charges when he traded in his 1994 Nissan early for a 1997 Nissan. The dealer, Reitenbaugh could not explain the calculation and referred Applebaum to NMAC. No one at NMAC could, or would explain the charge. When Applebaum's lawyer wrote to NMAC for an explanation of specifically how the charge was computed, NMAC refused. NMAC claimed that the law did not require an explanation. Incredibly, NMAC also claimed the computation of the charge was *proprietary*. App. 4a-5a; R.9-10.

Applebaum sued under the Consumer Leasing Act, 15 U.S.C. § 1667 ("CLA") and implementing Regulation M of the Federal Reserve Board ("Board") claiming, *inter alia*, that the lease failed to meet the disclosure requirements of the CLA. Unlike many other company's leases, the closed-end lease constructed by NMAC included the vehicle's residual value as an essential term in the calculation of the lessee's early termination liability.

Pursuant to Eastern District of Pennsylvania Local Rule 53.2, the case was assigned for the district's mandatory arbitration program. The arbitrators found in favor of Applebaum on one disclosure claim and awarded him $1000.

From this modest award, NMAC appealed and demanded a trial *de novo* in the District Court, where it thereafter sought summary judgment. The District Court thereafter held in part that the assigned residual of the

car, a constituent term in NMAC's early termination liability clause, did not need to be defined nor disclosed.[1] App. 28a-30a.

"Residual Value" means "the end-of-term value of the vehicle established at the beginning of the lease and used in calculating [the lessee's] base monthly payment." App. 15a. This residual value is critical in this particular lease contract because it is an integral part of the formula for the lessee's early termination liability. App. 16a-17a. On this point, the Court of Appeals unanimously reversed, holding that the CLA and Regulation M dictate that residual value, a figure known to NMAC at lease inception, must be disclosed in order to make the lease " 'reasonably understandable' in any meaningful sense of the term." App. 15a.

NMAC sought rehearing or *en banc* reconsideration, but that application was denied.

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[1] In finding that the Residual Value need not be disclosed under this particular lease formula, the learned Trial Court plainly misunderstood the meaning and import of the term. It held that Residual Value means "whatever value remains in the vehicle when the lease terminates. The CLA and Regulation M do not require further definition." App. 30a. The Court of Appeals held and NMAC now acknowledges that this basic definition by the Trial Court was incorrect. (Pet. 7; App. 15a).

REASONS FOR DENYING THE WRIT

In interpreting the Consumer Leasing Act and an implementing regulation which the Federal Reserve Board repealed in 1996, the Court of Appeals held only that "meaningful disclosure" of lease costs required NMAC to disclose in its closed-end consumer leases the residual value it used in setting lease terms. 15 U.S.C. § 1601(b). The Court did not ignore any regulation or Board commentary. Rather, the Court correctly found that the Board had not spoken to this particular disclosure issue. The Court also correctly found that the peculiar structure of the NMAC early termination clause made the residual value figure critical to "meaningful disclosure" of the lease terms. This common sense holding is far from extraordinary; the Board itself made "residual value" disclosure mandatory for all leases when it issued new regulations in 1997.

There is no conflict between the circuits. On the contrary, the Seventh Circuit's *Channell*[2] decision cited by Petitioner did not involve nor address residual values. In those areas where the decision below and *Channell* did intersect, the Third Circuit agreed with and adopted the Seventh Circuit's holding in all material respects.

Apart from having little future commercial significance, this case also has little practical importance. As a result of the Court of Appeals' ruling, NMAC's disclosure violation resulted in an award of statutory damages of

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[2] *Channell v. Citicorp National Services, Inc.*, 89 F.3d 379 (7th Cir. 1996).

$2000 to Applebaum. Virtually all leases using this outdated format have since expired. As such, this case presents neither issues of ongoing significance nor of current commercial importance.

ARGUMENT

A. The Regulation For Which Petitioner Seeks Review Was Repealed And Substantially Revised In 1996, Making The Issue – Though Correctly Decided – Certain Not To Recur.

Petitioner challenges the Court of Appeals interpretation of a version of Regulation M which was in effect from 1982 until its repeal in 1996. 12 C.F.R. § 213.4 (1995). The regulation then in effect did not expressly require nor excuse disclosure of a vehicle's residual value in a closed-end consumer lease. While the decision of the Court of Appeals was entirely correct and well reasoned, *see infra*, the issue is all but moot as the regulation was repealed and replaced by Regulations effective October 31, 1996. 61 Fed. Reg. 52246 (1996). Compliance with the revised regulations was optional until January 1, 1998. 62 Fed. Reg. 51006 (1997), 62 Fed. Reg. 53733 (1997). The new regulations, as amended, completely supersede and renumber the old regulations for all consumer leases beginning not later than January 1, 1998.[3]

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[3] While the amended regulation is not dispositive of the interpretation of the former regulation, the new regulation expressly requires the definition and amount of the vehicle's residual value to be plainly disclosed in all leases covered by the CLA. *See* 12 C.F.R. § 213.4(f)(4) (1998).

Thus, the great majority of leases subject to the repealed regulation have already expired or will expire imminently. While respondent does not suggest the issue is legally moot, it is for all practical purposes no longer an issue, save lingering litigation over the peculiar early termination provision of the old-style NMAC leases. Put otherwise, the Board itself settled this issue in 1996.

Although NMAC asserts that several new lawsuits have been filed allegedly "as a consequence of the Court of Appeals decision" (Pet 15 n.5), those cases (which involve only NMAC's leases) make a number of legal challenges to the NMAC lease and to charges levied at early termination, not simply the failure to disclose residual value. Contrary to NMAC's claim that the decision below was "enormously significant,"(Pet 14) it is virtually assured that the Court's narrow holding will be quite insignificant beyond the parochial interests of NMAC.

B. There Is No Circuit Conflict. The Seventh Circuit Decision Cited By Petitioner Did Not Address Residual Values In Leases; In Other Material Respects, The Court Below Agreed With The Decision Of The Seventh Circuit.

Contrary to the Petitioner's assertion, the decision below is not in conflict with the decision of the Court of Appeals for the Seventh Circuit in any material way. Rather, NMAC confuses the *holding* of *Channell* and *Applebaum* – which dealt with different CLA issues – with part of the Court's rationale. The holding of the Court below was that "[i]n order to discharge their disclosure obligations, the defendants in this case were required to

reveal the residual value that had been assigned to Applebaum's cars." App. 15a. The decision in *Channell*, by contrast, had nothing to do with whether the vehicle's residual value had to be disclosed. As set forth in the opening paragraph of the *Channell* decision:

> This case under the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667e, presents three questions. First, must a lessor that uses the sum-of-the-digits method (also known as the Rule of 78s) to calculate unearned interest explain what the method entails? Second, after disclosing that it will use the Rule of 78s, must the lessor actually use it? Third, may a District Court use the supplemental jurisdiction, 28 U.S.C. § 1367, to order members of a plaintiff class (which becomes a defendant class in a counterclaim) to pay what they owe on consumer leases?

Channell, 89 F.3d at 380.

On the other issue, comprehensibility, the *Applebaum* Court agreed with the *Channell* Court, rejecting a more consumer-friendly interpretation by the Court of Appeals for the Second Circuit in *Lundquist v. Security Pacific Automotive Fin. Serv.*, 993 F.2d 11 (2d Cir. 1993).[4] App. 11a. Both the Court below and the Seventh Circuit agreed that the purpose of the CLA and Reg. M was, in part, to

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[4] NMAC argues that the Court of Appeals took a "middle ground somewhere between *Channell* and *Lundquist*." (Pet 17 n.8) Yet even the more liberal construction of the "reasonably understandable" requirement taken by the *Lundquist* Court was well within proper interpretation of Reg. M, and did not merit review by this Court. *Lundquist, cert. denied*, 510 U.S. 959 (1993).

provide the lessee with sufficient information to determine what his cost or options may be at early termination. Minor disagreement over the possible meanings of the word "clear" in the old regulation is not material and does not warrant further review.

C. The Decision Of The Court Of Appeals Was Entirely Correct. Neither The CLA Nor The Board Have Held That Residual Value May Be Omitted Where The Lessor Implicates The Term In Its Formula.

Neither the CLA nor the (repealed) regulations of the Board state that a lessor need not disclose residual value in a closed-end lease where the lessor utilizes residual value as part of the consumer's early-termination liability. NMAC claims however that the Court of Appeals should have inferred (from silence) that the Board had made such a determination and then deferred to that inferred finding. Such an inference would not be warranted. The Court of Appeals reviewed the statutory language and the legislative history:

> The purpose of the legislation is to provide consumers with meaningful information about the component and aggregate costs of consumer leases, so that they can make better informed choices between leases, and between leases and credit sales. *See* S. Rep. No. 94-590 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431, 432.

App. 6a. The legislative history, with much input from the Board, makes clear that:

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> [C]onsumers need protection not only against inadequate cost disclosure, but also against miscalculations of residual value that entice them into leases with low monthly payments but that turn out to involve large bailoon payment obligations. . . . S. Rep. No. 94-590 (1976) *reprinted in* 1976 U.S.C.C.A.N. 431, 433-34.

Given this clear legislative intent and the statutory command of meaningful disclosure, 15 U.S.C. § 1601(b), it is illogical to infer that the Board would affirmatively determine, *sub silentio*, that residual value should not be disclosed in a lease where the lessor chooses to implicate that value. There is no basis to conclude that the Board intended that such leases be devoid of the very figure necessary for the consumer to shop and limit his or her liability upon early termination. To the contrary, the purpose of Reg. M is to assure meaningful disclosure and "to delimit the ultimate liability of lessees in leasing . . . " 12 C.F.R. § 213.1(b) (1995).

Even if NMAC were somehow correct about the inference to be drawn from the Board's failure to speak to inclusion of residual value in closed-end leases before 1996 (which they are not) such an implicit conclusion would not be entitled to deference. Only formal adjudications and notice-and-comment rule-making, which have the force of law, warrant deference. *Christensen v. Harris Co.*, 529 U.S 576 (2000). Enforcement guidelines, policy statements (neither of which are even present here) are not entitled to deference, but only to "respect" and then only to the extent those interpretations have the "power to persuade" *Id.* at 587. Silence on a subject, without explanation, is far from persuasive.

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There is no issue over claimed Court "modification" of Board disclosure requirements which would warrant review (Pet. 19) because the Board has never held that residual value need not be disclosed in a closed-end lease. On the contrary, since 1997, the Board has required that all closed-end leases must disclose residual value. 12 C.F.R. § 213.4(f)(4) (1998).

D. The Court Of Appeals Decision Does Not Conflict With The Supreme Court's Holding In *Ford Motor Credit Co. v. Milhollin*

Petitioner is incorrect when it asserts that this Court should accept review because the Court of Appeals failed to follow this Court's ruling in *Ford Motor Credit Corp. v. Milhollin*, 444 U.S. 555 (1980). The Court of Appeals addressed and carefully followed *Milhollin*. *See* App. 6a n.4, 16a. In *Milhollin*, the Board had issued published staff interpretations in which the Board "consistently construed" its regulation that the (challenged) right of acceleration need not be disclosed. *Id.* at 557. The Court of Appeals for the Ninth Circuit refused to follow the Board's published interpretation. In reversing, this Court in *Milhollin* held only that the Board's affirmative, published interpretation that disclosure was not required should have been granted deference. *Id.* at 569-70.

By contrast here, the Board had *not issued* any regulation or commentary expressing a view that residual value may be omitted in a lease whose early termination formula directly implicates it. There is no basis for NMAC's claim that the Board "deliberately decided not to" require disclosure of residual values here. (Pet. 24). NMAC cited no authority for this claim in its petition nor below. This

Court recognized in *Milhollin* that "[e]ven Regulation Z . . . cannot speak explicitly to every credit disclosure issue." *Id.* at 560. As such, it "is commonplace that Courts will further legislative goals by filling the interstitial silences within a statute or a regulation." *Id.* at 565. Following *Milhollin*, the Court of Appeals wisely held that the Board's failure specifically to require the disclosure of residual value in closed-end leases "cannot reasonably be interpreted as a considered decision that disclosure is not necessary . . . " App. 17a.

Petitioner also suggests that it should be insulated from liability because NMAC allegedly used "model forms" promulgated by the Board. (Pet. 9). There is nothing in the record whatever that NMAC ever relied upon or used model forms. More important, this defense was never presented below. As such, it is waived. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

NMAC's liability instantly to Applebaum as a result of the Court of Appeals' ruling was $2,000 plus counsel fees. 15 U.S.C. § 1667d; 15 U.S.C. § 1640(a)(2). Quite apart from the Court's sound reasoning, there is no reason to believe that the Court of Appeals' decision pertaining to a single disclosure in a particular form of lease – out of use since 1997 – will have any far-reaching impact which would warrant review by this Court.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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